IN THE HIGH COURT OF BOMBAY AT GOA
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REFERENCE UNDER INCOME TAX ACT NO. 1 OF 2003

The Commissioner of
Income Tax, having office
at Ayakar Bhavan, Patto
Plaza, Panaji, Goa. ... Applicant.

Versus

1. The Income Tax Appellate
Panaji Bench, having office
at Jeevan Vishwas, LIC
Bldg., 4th Floor, Plot no.2,
Patgto, Panaji, Goa, 403 001,

2. M/s Orient (Goa Ltd.),
having office at 18th June,
Road, Padmavati Towers
(Second Floor), Panaji,
Goa, 403 001. ... Respondents.

Shri S. R. Rivonkar with Ms. A. Phadte, advocates for the applicant.

Shri M. S. Usgaokar, Senior advocate with Ms. S. Kamat Wagh and Mr. I. Aga, advocates for respondent no.2.

CORAM : F. I. REBELLO &
P. V. HARDAS, JJ.

DATE : 24th June, 2003.

ORAL ORDER

The respondent Company is the assesee. An assessment Order was passed by the Assessment Officer on 20th February, 1995. The Commissioner of Income Tax (CIT) in exercise of its powers under Section 263 (1) of the Income Tax Act, 1961, re-opened the assessment by his Order on 27th February, 1997. Aggrieved by that Order an appeal was preferred by the assessee, which came to be allowed by Order dated 2nd December, 1997. The applicant thereafter made an application under Section 256(1) of the Income Tax Act

to refer the matter to this Court. That was rejected by Order of 21st June, 2002 and hence the present application under Section 256 (2) of the Income Tax Act.

2. At the hearing of the appeal, on behalf of the Revenue, their learned counsel contends that the following questions arise for consideration and the Appellate Authority be directed to refer them to this Court. The questions as formulated are as under:-

(a) Whether on the facts and circumstances of the case, the Tribunal was right in law, in holding that the Commissioner had no jurisdiction to initiate proceedings under Section 263 of the Income Tax Act 1961 in the present case?

(b) Whether on the facts and in the circumstances of the case the Tribunal was justified in law in holding that the appraisal report of the ADIT, which is a "record" of search and seizure proceedings, created only a suspicion not sufficient to invoke Section 263 despite the extended meaning of record as per clause (b) of Explanation to section 263 (1) as amended

by the Finance Act 1989?

At the hearing of the reference on behalf of the applicant, it is contended that the Tribunal misdirected itself in law in holding that the CIT had no jurisdiction to initiate proceedings under Section 263 of the Income Tax Act, 1961. The learned counsel has taken us through the relevant sections. It is pointed out that there is power in the Commissioner to call for and examine the record of any proceedings under the Act, if he considers that any order passed therein by the Assessing Officer is erroneous, insofar as it is prejudicial to the interests of the Revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made, such enquiry as deemed necessary, pass such order thereon, as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing fresh assessment. It is therefore contended that all that the Commissioner must satisfy himself is that the Order passed by the Assessing Officer is erroneous insofar as it is prejudicial to the interests of the Revenue. Once these predicates are satisfied, the Commissioner can exercise his powers under Section 263 (1). The Commissioner has so exercised his powers. Once that be the case, the Tribunal could not have held that the Commissioner had no jurisdiction. It is then contended that a search of the premises of the assessee Company had been

carried out and an appraisal report had been forwarded to the Assessment Officer on 6th April, 1994. The Assessment Officer has not considered the said report, nor has he given any reasons as to why he has rejected the said Report. The Tribunal has mainly proceeded on the footing that the assessment report at the highest creates a suspicion and is not sufficient to invoke Section 263. It is pointed out that the assessment report is a record which ought to have been considered. The Tribunal has misdirected itself in applying the wrong test and in these circumstances also the order is liable to be set aside and the Tribunal be directed to refer the said two questions to this Court.

Learned counsel has relied on the judgment in the case of **Rampyari Devi Saraogi vs. Commissioner of Income-Tax, West Bengal, & Ors., 67 ITR 84.** In that case the assessee had filed the petition challenging the notice issued under Section 33B of the Income Tax Act, 1922. That petition came to be rejected. The Apex Court held that on the face of the record the orders were prejudicial to the interests of the Revenue and in these circumstances observed that if enquiries made by him had been indicated to the assessee, the result would have been the same and the assessee has not in any way suffered from the failure of the Commissioner to indicate the results of the enquiries. Secondly, it was held that the assessee will have full opportunity of showing to the Income Tax Officer whether he

had jurisdiction or not and whether the income assessed in the assessment orders which were originally passed was correct or not. In other words, the issue therein was different from the issue in this case. There the issue was seeking exercise of powers under Section 33B of the Income Tax Act. That itself has been challenged by way of a Writ Petition under Articles 226 and 227 of the Constitution of India. It is in those circumstances that the said judgment has to be considered. The judgment, therefore, would be of no assistance in considering the controversy or the questions which the Revenue seeks to be referred to this Court.

Next reliance is placed on the case of **Commissioner of Income Tax vs. Shree Manjunathesware Packing Products and Camphor Works 231 ITR 53.** In that case the question referred to the High Court was whether in the facts and circumstances of the case the Appellate Tribunal was right in holding that the word "record" used in Section 26 (1) of the Act would not mean the record as it stands at the time of examination by the Commissioner, but it means the record as it stands at the time the order in question was passed by the Income-tax Officer. We are really not concerned with that issue as there is no dispute that the record, namely the appraisal report was before the Assessment Officer. That judgment, therefore, again would be of no assistance in dealing with the controversy which is in issue in this reference.

Lastly, reference was made to the judgment in the case of **Commissioner of Income Tax vs. Vallabhdas & Anr., 253 ITR 543.** What was in issue therein was whether the intervention of the Commissioner should be part of the records of assessment proceedings of the assessee and the statement of search operations regarding the son of the assessee could not be considered as forming part of the assessment of the assessee and thus the action was invalid. Again, we are not really concerned with the question that was framed therein.

4. In the instant case, from the record, we find that the assessment order under Section 143(3) was made on 20th February, 1995. Previous to that order, the CIT had written to the Deputy Commissioner of Income Tax (Assistant), Special Bench, Panaji, Goa, that the Deputy Commissioner may pass orders in accordance with law after due consideration of the explanation given by the assessee. That order of assessment was directed to be reopened by the CIT in exercise of its powers under Section 263 which accordingly passed an order thereon on 27th February, 1997. The assessee preferred an appeal to the ITAT Pune Bench, Pune. The Tribunal in paragraph 71 of the order observed that for the purpose of initiating of the proceedings under Section 263 (1) no conditions precedent are required to be fulfilled. However, when the statutory authority proceeds to act by virtue of the power given under the statutory enactment, exercise of which

is dependent upon the existence of certain objective factors and when a challenge is thrown that such objective factors are not present and such challenge is made by placing before the Tribunal factors which the statutory authority considered to be factors relevant for the exercise of the power and the order of the statutory authority does not disclose such factors, it is open to the Tribunal to examine whether such factors are relevant for the exercise of the power. What the Tribunal meant was that to proceed to pass an Order under Section 263(1) there must be existence of relevant objective factors.

5. In the instant case, the Tribunal noted that the assessment was sought to be re-opened on the ground that the appraisal reports prepared by the Income Tax Commissioner were not considered. The Tribunal held that the appraisal reports were duly forwarded by the Investigation wing to the A.O. with a view to investigate the issues with reference to the books of account maintained by the assessee and other materials which might be furnished by the assessee to the A.O. On receipt of the appraisal reports, the A.O. had examined three issues under consideration and thereafter has passed the order. The paper book discloses a letter dated 21st September, 1994, addressed by the Assessing Officer to the CIT, which includes annexures. The order would also show that the search report has been dealt with extensively. The learned Tribunal thereafter recorded that the appraisal

reports raised certain presumptions regarding the concealment of income under the three heads of review. The presumptions were rebuttable and in the instant case were, in fact, rebutted. The Tribunal thereafter noted that the only grievance of the CIT in the case appeared to be that the A.O. did not accept the appraisal report. Dealing with this contention, it was observed that the appraisal reports cannot be taken as conclusive evidence and after investigation if the A.O. finds that the contention of the assessee is acceptable and if the issues are clarified by the assessee, then no addition need be made on the basis of the appraisal reports only. Paragraph 76 would show how the appraisal reports were considered and how the CIT attention was drawn. In paragraph 77, the Tribunal notes that if the provisions of Section 263 were to be invoked by the CIT merely on the basis of the appraisal reports, it was for him to point out as to how and to what extent investigation done by the A.O. was not up to the mark. On the facts on record, the Tribunal found that there was nothing insofar as the Order passed by the A.O. and the entire basis on which the CIT exercised jurisdiction, was the appraisal report. There is also a finding recorded in paragraph 79 that the CIT did not consider the submission of the assessee and thus did not allow any meaningful and effective opportunity of being heard. There is further discussion which need not be adverted to. Based on that the appeal was allowed.

It is after that that the Revenue sought a statement of the case to be referred to this Court which was rejected and against which the present reference is filed.

6. On consideration of the material, we are of the opinion that the question as framed will not arise at all. Firstly, the appraisal report has been considered. The CIT had exercised jurisdiction under Section 263 (1) of the Income Tax Act on the basis that the appraisal report was not considered. The Tribunal has given reasons as why the CIT could not have so acted. We agree with the Tribunal that the appraisal report was considered by the assessing officer. Merely because the assessment officer did not accept the appraisal report, by itself, cannot mean that it gave jurisdiction to the CIT to exercise jurisdiction under Section 263 (1) of the Income Tax Act. We further agree with the Tribunal that it is not merely sufficient that the order must be prejudicial to Revenue. The order must in the first instance be erroneous. The appraisal report was before the Assessing Officer. The Assessing Officer has dealt with the appraisal report. The Assessing Officer had before him the appraisal report and before passing the order of assessment had written to the CIT. The CIT wrote to the Assessing Officer to pass orders according to law. The only ground on which the CIT exercised jurisdiction was the appraisal report. That has been dealt with by the Tribunal by holding that in the exercise of statutory powers, the authority

exercising such powers depends on the existence of certain objective factors. It cannot be said that this proposition is erroneous. Exercise of jurisdiction must depend on the existence of essential factors. In the instant case, apart from being prejudicial to the interest of Revenue, it must be erroneous. The only ground why it was held to be erroneous was the non-acceptance of the appraisal report. That has been dealt with by the Tribunal, by holding that in the exercise of statutory powers the authority exercising such powers depends on the existence of certain objective factors. It cannot be said that this proposition is erroneous. Exercise of jurisdiction must depend on the existence of essential factors. In the instant case, apart from being prejudicial to the interest of the Revenue, it must be erroneous. The only ground why it was held to be erroneous was the non-acceptance of the appraisal report. That has been dealt with by the Tribunal. We have no reasons to differ with the view taken.

7. We, therefore, find that no case is made out for reference. In the light of that, the present reference is rejected.

F. I. REBELLO, J.

P. V. HARDAS, J.